IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 747 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
GAJEKHAN FATEKHAN & 2 - Opponent(s)

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Appearance :
MR KT DAVE, APP for Appellant(s) : 1,
MR HN JHALA for Opponent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 20/07/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. This is an appeal under Section 378 of the Code of Criminal Procedure, whereby the appellant State of Gujarat has assailed the legality and validity of the order of acquittal passed by the learned Additional Sessions Judge, Ahmedabad Rural, in Sessions Case No.124 of 1985 whereby he has acquitted all the three respondents accused from the charge of offence punishable under Sections 302, 504 read with 34 of the Indian Penal Code.

2. The State has challenged the judgment on various grounds mentioned in para-4 of the memo of appeal. Mr.K.T.Dave, learned APP has

taken us through the judgment under challenge and the relevant part of the oral evidence of two material witnesses and eye witnesses to the incident examined by the prosecution as well as the medical evidence led in support of the case of prosecution. It is the case of the prosecution that injured Vajesing Amrsing Rathod (Original complainant) has succumbed to the injury inflicted by original accused No.2 Jainkhan Fatekhan. Accused No.1 is the brother of the accused No.2 and accused No.3 is the father of the accused No.2. For the sake of brevity and convenience we would like to mention the facts placed before the trial Court in brief:-

3. It is alleged that on 24.8.1985 at about 8:30 a.m accused was passing on a road in the village Chekhla. All the accused persons took quarrel with deceased Vajesing and abused and instigated him and, thereafter

accused No.1 gave a 'dhariya' blow on the head of the deceased Vajesing. In the same way accused No.2 gave a blow with 'danti' an agriculture instrument, and accused No.3 assaulted with lathi. The intention of all the three was to commit murder of Vajesing. Vajesing was going with his mare, when he was assaulted. The deceased sustained a serious injury on his right front parietal region of skull and the wound was vertically situated. It was of the size of 2inch x 1inch x 1inch. The injured immediately was taken to Sanand Hospital. He was treated by doctor at about 8:45 a.m and, thereafter, he was asked to go to police station. He was also advised to go to Ahmedabad for better treatment as he had sustained serious injury. It is the say of the prosecution that Sanand Police recorded the complaint of injured Vajesing and asked him to place Ahmedabad with necessary police yadi for treatment. The injured succumbed to the injury on 2.9.1985. The police,

therefore, amended the charge by adding Section 302 of the Indian Penal Code. After investigation and in the background of the cause of death certified by the doctor who has performed the autopsy he charge-sheeted all the three accused for the above said charges.

4. One of the arguments of Mr.Dave is that the FIR i.e complaint filed by injured could have been exhibited and read in evidence and it should be given weightage of a dying declaration within the meaning of Section 32 of the Indian Evidence Act. On close reading of the judgment under challenge it is clear that the learned trial Judge has appreciated the complaint Mark-17/1 as if the same has been given exhibit and due weightage has been given to the content of the complaint so it is not necessary for us to give a document formal exhibit. The Court is supposed to see that the document is legally and validly

proved and should be read in evidence. The same has been read by the learned trial Judge. The learned trial Judge while acquitting the accused has assigned three important reasons. We are convinced with these reasons or any one of them would be sufficient to record acquittal and such acquittal cannot be said to be either patently perverse or illegal. These reasons are :-

(i) That this is a cross case and the deceased Vajesing was accused of NC complaint registered by Jainkhan on the very day in couple of minutes to Sanand Police Station and he had informed the Sanand Police that he was assaulted by deceased Vajesing on nose and he has sustained painful injury. The learned Judge has appreciated that the doctor examined by the accused side as defence witness has categorically stated that the injured Jainkhan had bleeding injury on nose

and on taking of exray the nose bone was found fractured. The bleeding visible injury was on the body of the person of the one accused i.e accused No.1 Jainkhan and none of the prosecution witnesses pausing themselves as eye witnesses i.e Samantsinh and Ramsang Ranaji have failed in explaining this injury. There is no explanation in the complaint filed by the deceased Vajesing Mark-17/1. Failure to explain the injury on the present accused affects adversely to the merit of the case of the prosecution. The learned trial Judge has appreciated this aspect in the background of the decision of Laxmising and others vs. State, reported in 1976 SCC 671.

(ii)That the right to private defence pleaded by the accused is found plausible. The self defence is pleaded specifically and if it is found probable then the Court should accept the say of the accused. The learned trial

Judge has appreciated the decision of the Hon'ble Supreme Court in the **case of Pratap vs. State, reported in SCC 1976 page-303**. Here in the present case say of accused Jainkhan is that his NC complaint registered and proved by PW-9 Police Head Constable Karansinh and the deposition of defence witness No.1 Dr. Mehul Poojara Ex.61 if considered then it should be accepted that the accused have taken valid and sustainable defence. We have also considered one aspect reflected in panchnama Ex.27 wherein it is mentioned that at the time of arrest of accused Jainkhan he had two injuries on his body, one on the nose and another on elbow and it was not possible for the trial Court to ignore this aspect.

(iii) The prosecution has examined two eye witnesses one of them Samantsinh, who is a close relative and the other one Ramsang Ranaji, who is neighbour. They are not found

reliable and it appears that only with a view to help the prosecution side they have tried to keep a screen on the first part of the incident wherein accused Jainkhan sustained injuries. The say of PW – Samantsinh is found to be a version of chance witness. His presence at the spot of incident is doubtful. The village where incident occurred is the small village and it is not in the evidence that the area where the incident occurred has any rickshaw stand. The place where the incident occurred is not the area of residence of Vajesinh, the injured. The accused might not be knowing that the deceased Vajesing is going to pass through the road where all the three accused were there near a flour mill. With this set of fact, non-examination of one independent witness affects adversely the case of the prosecution. It is the say of the prosecution that one Rama Hathiji has also seen the incident. He is not related or

close to either party. So non-examination of independent witness would go against the prosecution and the version of other two persons who are claiming to be eye witnesses.

5. According to us there is clear cut evidence whereby it is possible to infer that the fetal injury found on the body of the person deceased was caused by 'dhariya' only. It could have been caused by blunt side of danti or by a lathi. We have considered the medical evidence and conflict in the opinion expressed. It also emerges that the quarrel must have taken place between two i.e deceased Vajesing and accused No.2 Jainkhan and the complainant side has tried to involve all the three in the offence. The injured had died after several days. At the time of performing of postmortem there were two major surgical wounds on the head. The details are described in Column No.17 of P.M. Note. It is clear that the dura underneath the long

gaps was surgically stitched. Some grafting was also found and there was some liquid i.e yellowish gear pus was also seen on dura. Doctor has said that the death is caused because of the injury to brain and its complication. The second injury on the person deceased was minor injury that can be caused on account of fall. So in reality this is a case of single blow given on the head from the accused side. No corroboration as to three different blows can be inflicted by dhariya, danti and lathi were found when the injured was treated initially. So according to us probably the injured himself had gone at the place where the accused No.2 Jainkhan was present on his mare and both sustained injury in the quarrel. It is the say of the Jainkhan to save himself from graver injury he had retaliated. This conduct or act of accused No.2 cannot be said to be unjustified.

6. According to us, for the reasons aforesaid, the finding recorded by learned trial Judge is absolutely legal. No grave error can be said to have have been committed while acquitting the accused persons. It is even possible for us to say that the accused No.2 had acceded the private defence. No active role is found proved to the satisfaction of the Court and, therefore, the present appeal shall have to be dismissed. Hence, this appeal is dismissed.

(C. K. BUCH, J.) (K. A. PUJ, J.)

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